

JUDGE SPATZ

08 CIV 5415

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

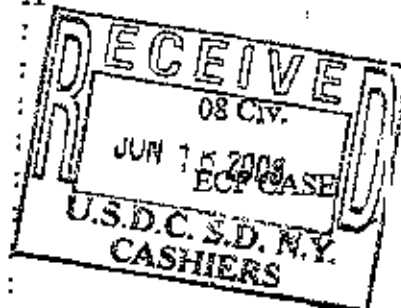
COSCO BULK CARRIER CO. LTD.,

Plaintiff,

- against -

XYZ

Defendant.



VERIFIED COMPLAINT

Plaintiff, COSCO BULK CARRIER CO. LTD. (hereinafter "Cosco" or "Plaintiff"), by and through its attorneys, Lennon, Murphy & Lennon, LLC, as and for its Verified Complaint against the Defendant, XYZ, alleges, upon information and belief, as follows:

1. This is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure and 28 United States Code § 1333. This claim involves the breach of a maritime contract of charter. This matter also arises under the Court's federal question jurisdiction within the meaning of 28 United States § 1331.
2. At all times material to this action, Cosco was, and still is, a foreign corporation, or other business entity organized and existing under the laws of China.
3. Upon information and belief, XYZ was, and still is, a foreign corporation, or other business entity organized and existing under the laws of Hong Kong.
4. At all times material to this action, Cosco was the manager of the vessel "ABC" (hereinafter "The Vessel").

5. By a fixture note incorporating the terms of the GENCON 94¹ charter party, dated February 15, 2006, (hereinafter "the fixture note"), Cosco voyage chartered the vessel "MV. TEN"² to Defendant for the carriage of two cargos of steel coils from the loading ports of Dalian Port and Bayuquan Port, China to the discharge ports of Houston, Mobile, and Tampa, USA and Veracruz and Tampico, Mexico. *A copy of the fixture note is attached hereto as Exhibit "1."*

6. Cosco issued a Bill of Lading for carriage of the cargo. *A copy of the Bill of Lading is attached hereto as Exhibit "2."*

7. Pursuant to the terms of the fixture note, Cosco delivered the Vessel into the service of Defendant and has at all times fully performed its duties and obligations under the charter party.

8. Disputes later arose between the parties regarding alleged salt water damage to the steel cargo. An investigation by Cosco revealed that the cause of the damage was due to a hopper tank plating puncture to the Vessel's hold number one. The puncture was caused by the stevedores during cargo loading operations. The steel cargo damage was discovered on May 29, 2006, a few days before discharge operations commenced. The cargo discharge operations took place from June 2006 through June 3, 2006.

9. Pursuant to the loading and discharging terms of the fixture note, the cargo was to be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed and/or secured and taken from the holds and discharged by Defendant, free of any risk, liability and expense whatsoever to Cosco.

10. The fixture note allocates liability for damage to the cargo occurring during loading and discharging operations to the charterer, Defendant.

¹ It is a uniform general charter party known as "The Baltic and International Maritime Council Uniform General Charter (as revised 1922, 1976 and 1994); Code Name: "GENCON".

² "Be Nominated"

11. Cosco received a cargo claim from Clyde & Co., counsel for the consignee of the steel cargo. Consignee demanded that Cosco post security in its favor in the amount of \$300,000.00 for damage to the cargo or else face possible arrest or other detention of the Vessel or any other vessel or other property owned or managed by Cosco.

12. In order to avoid arrest or detention of its vessels, Cosco posted the requested security in the amount of \$300,000.00 via a Letter of Undertaking. This claim is now being arbitrated in Hong Kong. *A copy of the Letter of Undertaking is attached hereto as Exhibit "3".*

13. Thereafter, Cosco demanded security from the real party liable for the damage, to wit, Defendant, in the amount of \$300,000.00. *See Cosco's demand for security dated May 29, 2008 attached hereto as Exhibit "4".*

14. To date, Defendant has refused to post security. *See Exhibit "4."*

15. Defendant has breached the terms of the fixture note by refusing to post security for the steel cargo damage, despite that it is the party liable for this damage under the fixture note.

16. There is a split of authority among district judges within the Southern District of New York as to whether an indemnity claim is ripe and therefore a proper claim under Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims (hereinafter "Admiralty Rule B").

17. Cosco has a valid maritime claim properly justifying an attachment under Admiralty Rule B. Cosco has been required to post security in the amount of \$300,000.00 and thus had to "repay a debt owed to it." *See Navalmar (U.K.) Ltd. v. Welspun Gujarat Stahl Rohren, Ltd.*, 485 F. Supp. 2d 399,404, 2007 U.S. Dist. LEXIS 29789 (2007) (holding plaintiff had alleged a valid admiralty claim under Admiralty Rule B where Plaintiff had been required to post security to secure the consignee of the goods for the damages to cargo, and thus, having been required to post security, had a direct interest in securing its claim of indemnity against defendant.) (Cf. *Ranko*

Steamship Co., Ltd. v. China National Chartering Corp., 536 F. Supp. 2d 362, 365, 2008 U.S. Dist. LEXIS 16512, holding that an indemnity claim is not ripe until the underlying cargo claim has been paid.)

18. Pursuant to the fixture note, disputes between the parties are to be submitted to arbitration in Hong Kong with English law to apply. Cosco will commence arbitration after the commencement of this action and jurisdiction is obtained over Defendant.

19. This action is brought in order to obtain jurisdiction over Defendant and also to obtain security for Cosco's claims and in aid of Hong Kong arbitration proceedings.

20. Interest, costs and attorneys' fees are routinely awarded to the prevailing party under English Law. Section 63 of the English Arbitration Act of 1996 specifically allows for recovery of these items as part of an award in favor of the prevailing party.

21. As best as can now be estimated, Plaintiff expects to recover the following amounts in arbitration as the prevailing party:

a.	Plaintiff's Principal Claim:	\$ 300,000.00
	<i>Amount posted as security for damage to steel cargo</i>	
b.	Interest for 2 years, compounded quarterly at 7%:	\$ 44,664.53
c.	Estimated arbitration costs:	\$ 27,000.00
d.	Estimated recoverable legal fees and costs:	\$ 105,000.00
	Total:	\$ 476,664.53

22. The Defendant cannot be found within this District within the meaning of Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, but, upon information and belief, Defendant has, or will have during the pendency of this action, assets within this District and subject to the jurisdiction of this Court, held

in the hands of one or more garnishees which are believed to be due and owing to the Defendant.

See Affidavit in Support of Prayer for Maritime Attachment annexed hereto as Exhibit "3".

23. The Plaintiff seeks an order from this court directing the Clerk of Court to issue Process of Maritime Attachment and Garnishment pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims, attaching, *inter alia*, any property of the Defendant held by any garnishee within the District for the purpose of obtaining personal jurisdiction over the Defendant, and to secure the Plaintiff's claims as described above.

WHEREFORE, Plaintiff prays:

A. That process in due form of law issue against the Defendant, citing it to appear and answer under oath all and singular the matters alleged in the Verified Complaint;

B. That pursuant to 9 U.S.C. §§ 201, *et seq.* and/or the doctrine of comity this Court recognize and confirm any foreign judgment or arbitration award rendered on the claims had herein as a Judgment of this Court;

C. That since the Defendant cannot be found within this District pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims, this Court issue an order directing the Clerk of Court to issue Process of Maritime Attachment and Garnishment pursuant to Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims, attaching all tangible or intangible property of the Defendant within the District, including but not limited to any funds held by any garnishee, which are due and owing to the Defendant, up to the amount \$476,664.53 to secure the Plaintiff's claims, and that all persons claiming any interest in the same be cited to appear and pursuant to Supplemental Admiralty Rule B answer the matters alleged in the Complaint;

D. That this Court enter Judgment against Defendant on the claims set forth herein;

E. That this Court retain jurisdiction over this matter through the entry of any judgment or award associated with any of the claims currently pending, or which may be initiated in the future, including any appeals thereof;

F. That this Court award Plaintiff its attorney's fees and costs of this action; and

G. That the Plaintiff have such other, further and different relief as the Court may deem just and proper.

Dated: June 12, 2008
New York, NY .

The Plaintiff,
COSCO BULK CARRIER CO. LTD.

By: Anne C. LeVasseur
Patrick F. Lennon
Anne C. LeVasseur
Charles E. Murphy
LENNON, MURPHY & LENNON, LLC
420 Lexington Ave., Suite 300
New York, NY 10170
(212) 490-6050 - phone
(212) 490-6070 - fax
pfl@lenmur.com
acl@lenmur.com
cem@lenmur.com

ATTORNEY'S VERIFICATION

State of Connecticut)
County of Fairfield) ss.: Town of Southport.

1. My name is Anne C. LeVasseur.
2. I am over 18 years of age, of sound mind, capable of making this Verification, and fully competent to testify to all matters stated herein.
3. I am an attorney in the firm of Lennon, Murphy & Lennon, LLC, attorneys for the Plaintiff.
4. I have read the foregoing Verified Complaint and know the contents hereof and believe the same to be true and accurate to the best of my knowledge, information and belief.
5. The reason why this Verification is being made by the deponent and not the Plaintiff is that the Plaintiff is a business organization with no officers or directors now within this District.
6. The source of my knowledge and the grounds for my belief are the statements made, and the documents and information received from, the Plaintiff and agents and/or representatives of the Plaintiff.
7. I am authorized to make this Verification on behalf of the Plaintiff.

Dated: New York, NY
June 12, 2008

Anne C. LeVasseur
Anne C. LeVasseur

EXHIBIT 1

DATE: 11/11/2011 PAGE: 1

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

TOP SECRET//SI//NF

4-23-75

SECRET

~~REF ID: A53066~~

CO. LTD. 15000000 AND
TERMS AND CONDITIONS

• TEL: 511, TEX: 57 0021 MERCEDES WAGEN, SPAIN TO BE COVERED WITH
REQUIREMENTS OF PROSECUTION AND GRAND JURY EVIDENCE AND MAIL

030 2704574-07452

*1 CARGO: 29 AIRBORNE MOBILE SYSTEMS PRODUCTS

ZIP CODE : 18042

SECRET : 1 SEP 2002 10:00 AM 16 SEP 2002 10:00 AM 17 SEP 2002 10:00 AM
CITE

1-207-1002-4-2254 HAYMAKERS' SQUARE PINE ROD+12-25-50T STEEL, CHINA

1507 AMERICAN, USA

4.24945 steel 0.0015

SECRET **UNCLASSIFIED//FOR OFFICIAL USE ONLY**

DATE : 1 SEPTEMBER 1963

IMPORT : CORDON ROUGE BEAUTY VERACRUZ, MEXICO 275000, BEAUTY STE. PLATE.
2500 STE. COTAS

CHESEBROUGH'S WHITE OF TARTAR, MEDICAL PURPOSES

ಪ್ರಾಚೀನತನು-ಶ್ರೀ ಮಹಾಶಯ

PROFIT CARGO FOR ALL EXPORT ON AVERAGE EQUALS THAT MOST 26 IF OWNER CAPTURED VESSEL'S AGE OVER 20 YEARS, GREATER AT THREE DISCOUNT USED AS PLAT FORM FOR FURTHER VOYAGE AS INDICATING OVER AGE PROGRAM

SHIPMENTS GRANTED TO PAY US\$2000 FINE TO OWNS IN ADVANCE 3 CARGO AND/OR DOCUMENTS ARE ONLY TRANSFERRED ON ARRIVAL AT LEAD OFFICE DIRECT PORTS RESPECTIVELY AND THE RECEIVER WILL NOT TAKE THE CARGO AS PER CUSTOM OF THE PORT.

LAUNCHING COSTS TO BE ARRANGED BY CENTRE, AND TO BE FOR CENTRE ACCT.

REPAYMENT TERM: 100% PAYMENT TO BE PAID WITHIN 15 BUSINESS DAYS AFTER COMPLETION OF LOADING AND DISEMBARKING THE BULK CARGO. THE PAYMENT AFTER 01/1 IN CASE THE CARGO IS NOT RECEIVED, THEN OWNER CAN ONLY INSTRUCT CARRIER AGENT TO RELEASE BULK CARRIER RECEIPT OF CARGO FROM SHIP. FULL FREIGHT DUE PAID UPON COMPLETION OF LOADING, DISEMBARKING AND NON-RETURNABLE WHETHER VESSEL AND/OR CARGO LOST OR NOT.



FILED-2008 06/08 FROM:

70-1215532423

P.2

CHARTERER COVENANTS BY WRITING THAT THEY DO NOT, AND WILL NOT, EMPLOY OR STAY IN ANY MANNER OR MANNER MATERIAL WITH THEIR STEEL PRODUCTS, IF FOR STAY OR STAY ON ANY SHIP THE APPLICABLE PRODUCT WILL BE CLEANED AT THE CHARTERERS EXPENSE AND KEPT IN A SAFE PLACE. IF ANY STEEL OR RAY STAYS OUTSIDE THE SHIP'S COMMAND, IS LOADED WITH THE STEEL AND DISCOVERED DURING THE SHIP'S TRAVEL, THE STEEL WILL BE REPAIRED, CLEANED AND THEN RELOADED. ALL COSTS RELATED WITH THE WAY AND STAY OF THE STEEL TO BE FOR THE CHARTERERS ACCOUNT.

CHARTERER SHALL BE RESPONSIBLE FOR THE COSTS OF THE STEEL TO BE FOR THE CHARTERERS ACCOUNT.

ANY DAMAGES TO THE SHIP OR TO THE STEEL TO BE FOR THE CHARTERERS ACCOUNT. ANY DAMAGES TO THE SHIP OR TO THE STEEL TO BE FOR THE CHARTERERS ACCOUNT.

THE COST OF THE STEEL TO BE ALLOWED.

AGENTS OF THE CHARTERERS TO BE ALLOWED.

CHARTERER SHALL BE RESPONSIBLE FOR THE COSTS OF THE STEEL TO BE FOR THE CHARTERERS ACCOUNT.

AGENTS OF THE CHARTERERS TO BE ALLOWED.

CHARTERER SHALL BE RESPONSIBLE FOR THE COSTS OF THE STEEL TO BE FOR THE CHARTERERS ACCOUNT.

CHARTERER SHALL BE RESPONSIBLE FOR THE COSTS OF THE STEEL TO BE FOR THE CHARTERERS ACCOUNT.

SIGNATURE
FOR AND ON BEHALF OF CHARTERER

For and on behalf of

SIGNATURE
FOR AND ON BEHALF OF OWNER

For and on behalf of
WORLD WIDE STEEL CO. LTD
+223 22 22 22 22

Signature of the Owner

EXHIBIT 2

Address: _____

Page 34

P.S

4. 10. 2014

February 1994

2019年12月15日

Word of Experience

ACTUAL LOT NUMBER: LIT 3

1957-58 1st Year

2020年12月24日

2075 SEVEN HUNDRED SEVENTY FIVE PERIOD ONLY.

performed by the contractor. The contractor is responsible for the work performed by the contractor.

[illegible]

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

Address (page 1)	Place of birth: TAIPEI, CHINA
Address (page 2)	Agency: AN AGENT FOR THE ROYALTY IN QINGHAI
TELEPHONE	

EXHIBIT 3

Vice President
for and on behalf of
Assuranceforeningen SKULD (Gjensidig)

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Page 15 of 23

EXHIBIT 4

JUN 10 2008 11:13 AM

Page 1 of 4

(3)

Jenny Chu

From: Jenny Chu
Sent: Thu29 May 2008 15:26
To:
Cc:
Subject:

Fax: 2802 8635

F/N dated 15th February 2008

Damage to Prime Galvanized Steel Coils - June 2008

Dear Sirs,

We refer to your email below, contents of which are totally rejected.

The expert evidence we have collected shows that the damage was a hidden damage which could not be found at the loading, and we had already notified you once we found that the damage to the vessel was caused by the stevedores. This does not exclude your liability from clause 5 (c) of Gencon 94. As a result, your rejection of the liability under this clause was utterly unacceptable.

In the meantime, whilst we reserve our right to claim against you regarding the damage to the vessel itself, the damage we are seeking to recover from you now is the cargo damage, which is totally different from the clause 5 (c) as you quoted. If you think that you can get out of your liability by clause 5 (c) which we hereby expressly deny, then please bear in mind that this clause is about the damage to the vessel, but does not exclude your liability from the damage to "the cargo".

We have expert evidence to support our claim against you and we have to inform you that your so-called legal point of view under clause 5 (c) is too weak to protect your position and will definitely not be accepted under English law.

We reiterate our demand for security (in the amount of US\$300,000 plus interest and costs) from you set out in our email of 27th May 2008 remains the same.

If we do not have the security (subject to the wording of the security to be approved by us) by close of business 2nd June 2008 Hong Kong time, we will proceed to take action

Jul 1

2. 18

Page 2 of 4

IMMEDIATELY without any leeway, and all the costs/expenses will also be for your account.

As the matter is already in the arbitration and we have already had our lawyers involved, we can take action immediately, so we will do what we mean and this message only serves as our FINAL WARNING to you.

We trust our position is clear to you.

Yours faithfully,
SKULD (Far East) Ltd
Jenny Chu
www.skuld.com

From:
Sent: 29. Thu. May 2008 14:12
To: Jenny Chu
Cc:
Subject:

To: SKULD (Far East) Ltd
Attn: Ms Jenny Chu

Dear sirs

Your Mail dated 27th May, 2008 noted with thanks.

However, we have to inform you with regret that charterers cannot agree/accept any requests of security mentioned in your message.

Charterers have to reiterate again and again that under Clause 5(a) of GENCON 94, damage shall be notified as soon as reasonably possible by the Master to the Charterers or their agents and to their Stevedores, failing which the Charterers shall not be held responsible. Charterers/Shipers had no idea about the stevedores damage at loading port and the surveyor's report done at port of discharge. There are still no any good proofs were furnished to prove any stevedore damage occurred during loading and afterwards.

We are looking forward to Owners/Carriers' withdraw their unreasonable request.

This message is to be regarded issued in due legal form, without admission/acceptance to/of any liability of
and/or Charterers/Shipers and is without prejudice whatsoever.

----- Original Message -----
From: Jenny Chu
To:
Cc:
Sent: Tuesday, May 27, 2008 4:24 PM
Subject:

At

Jan. 10,

2. 19

EXHIBIT 5

Finally, I checked the New York State Department of Corporations' online database which showed no listings or registration for the Defendants.

3. I submit based on the foregoing that the Defendant cannot be found within this District within the meaning of Rule B of the Supplemental Rules for Certain Admiralty and Maritime Claims.

4. Upon information and belief, the Defendant has, or will have during the pendency of this action, tangible and intangible property within this District and subject to the jurisdiction of this Court, held in the hands of in the hands of garnishees within this District, which are believed to be due and owing to the Defendant.

5. This is Plaintiff's first request for this relief made to any Court.

PRAYER FOR RELIEF FOR ORDER ALLOWING SPECIAL PROCESS SERVER

6. Plaintiff seeks an Order pursuant to Rule 4(c) of the Federal Rules of Civil Procedure, for an Order appointing Patrick F. Lennon, Kevin J. Lennon, Charles E. Murphy, Nancy R. Peterson, Coleen A. McEvoy, Anne C. LeVasseur or any other partner, associate, paralegal or agent of Lennon, Murphy & Lennon, LLC, or any process server employed by Gotham Process Servers, in addition to the United States Marshal, to serve the Ex Parte Order and Process of Maritime Attachment and Garnishment, together with any interrogatories, upon the garnishee(s), together with any other garnishee(s) who (based upon information developed subsequent hereto by the Plaintiff) may hold assets of, for or on account of, the Defendant.

7. Plaintiff seeks to serve the prayed for Process of Maritime Attachment and Garnishment with all deliberate speed so that it may be fully protected against the potential of being unable to satisfy a judgment/award ultimately obtained by Plaintiff and entered against the Defendant.

8. To the extent that this application for an Order appointing a special process server with respect to this attachment and garnishment does not involve a restraint of physical property, there is no need to require that the service be effected by the Marshal as it involves simple delivery of the Process of Maritime Attachment and Garnishment to the various garnishees to be identified in the writ.

PRAYER FOR RELIEF TO SERVE LATER IDENTIFIED GARNISHEES

9. Plaintiff also respectfully requests that the Court grant it leave to serve any additional garnishee(s) who may, upon information and belief obtained in the course of this litigation, to be holding, or believed to be holding, property of the Defendant, within this District. Obtaining leave of Court at this time to serve any later identified garnishees will allow for prompt service of the Process of Maritime Attachment and Garnishment without the need to present to the Court amended Process seeking simply to identify other garnishee(s).

PRAYER FOR RELIEF TO DEEM SERVICE CONTINUOUS

10. Further, in order to avoid the need to repetitively serve the garnishees/banks, Plaintiff respectfully seeks further leave of the Court, as set out in the accompanying Ex Parte Order for Process of Maritime Attachment, for any process that is served on a garnishee to be deemed effective and continuous service of process throughout any given day on which process is served and throughout the next day, provided that process is served the next day, and to authorize service of process via facsimile or e-mail following initial *in personam* service.

PRAYER FOR RELIEF TO TEMPORARILY FILE PLEADINGS UNDER SEAL AND
FILE REDACTED PLEADINGS WITH ECF

11. Upon information and belief, it is the practice of many law firms in the maritime bar to review the daily electronic docket sheet of the Southern District of New York for all maritime actions filed in the district and inform the defendant(s) named therein of any Ex Parte Orders of Attachment pending against them, thus defeating the purpose of the "Ex Parte" application.

12. Upon information and belief, it is the practice of certain publications, specifically Tradewinds, to publish the names of defendants named in Ex Parte Orders of Attachment, thus further defeating the purpose of the "Ex Parte" application.

13. Upon information and belief, Tradewinds has very recently publicized the names of parties in Rule B proceedings, the amount of the attachments, and other details of the actions, thereby further defeating the purpose of the "Ex Parte" application.

14. The Courts within the Southern District of New York have an interest in preserving the efficacy of the Ex Parte Orders issued therein.

15. The above interest supersedes the interest in maintaining a completely public docket, especially given that the public's access will only be limited temporarily until assets are attached and notice of attachment has been provided to the Defendant.

16. Indeed, the public's access to Ex-Parte Orders of Maritime Attachment defeats their entire purpose, by depriving Plaintiffs of the element of surprise and potential allowing Defendants to re-route their funds to avoid the attachment, thus making the attachment remedy hollow.


17. For the foregoing reasons, Plaintiff requests that this Court issue an Order that the pleadings, including the Verified Complaint and Orders filed herein, be temporarily filed under seal, and that the Plaintiff be directed to file a second set of pleadings on ECF, redacting the name of the Defendant and the name of the Vessel involved in this matter, and that the Court's order of maritime attachment and Order Appointing Special Process Server be kept under seal until this Court directs otherwise.

18. This request is narrowly tailored to meet Plaintiff's needs. Once property is attached, the case should be unsealed, and unredacted pleadings may be posted electronically, as the interest underlying sealing the case and filing redacted pleadings will have been largely eliminated.

Dated: June 12, 2008
Southport, CT


Anne C. LeVasseur

Sworn and subscribed to before me
this 12 day of June, 2008.


Notary Public / Commissioner of
Superior Court